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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 296.

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, et al.,
Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

WALTER E. HOPE,
Counsel for Appellant.

TIMOTHY N. PFEIFFER,
JOHN E. LOCKWOOD,
EDGAR P. BAKER,
of Counsel.

INDEX

	PAGE
Opinion below	1
Statute involved	1
Statement	3
Assignment of errors	9
Summary of argument	10
Argument:	
I. The provision for the one cent differential constitutes an arbitrary and unreasonable discrimination against the appellant and others similarly situated, which denies them the equal protection of the laws	11
(1) It has not been advocated by any of the impartial investigating agencies	12
(2) It has no relation to cost	13
(3) It has no relation to quality	13
(4) It has no relation to service	13
(5) It is not an expression of policy against appellant's advertising	13
(6) It is not aimed at unfair practices	14
(7) It is not directed against monopoly	14
(8) It results in no benefit to the farmers	16
(9) It is economically indefensible	16
(10) It has no relation to the emergency giving rise to the Milk Control Law	17
II. The provision for the one cent differential represents a new departure in governmental regulation and is of a character which has never been sanctioned by this Court. The principle involved is unsound and its approval will lead to far-reaching and dangerous consequences	18

PAGE

III. The one cent differential is not an integral part of the Milk Control Law and may be declared invalid without invalidating the remainder of the statute 26

CITATIONS.

CASES:

American Sugar Refining Co. vs. *Louisiana*, 179 U. S. 89 23
Armour Packing Co. vs. *Lacy*, 200 U. S. 226 24

Banton vs. *Belt Line Ry.*, 268 U. S. 413 22
Bradley vs. *Richmond*, 227 U. S. 477 24

Cargill vs. *Minnesota*, 180 U. S. 452 23
Champlin Refining Company vs. *Commission*, 286 U. S. 210 27
Connolly vs. *Union Sewer Pipe Company*, 184 U. S. 540 25
Cotting vs. *Kansas City Stock Yards Co.*, 183 U. S. 79 ..... 21, 22

Fairmont Creamery Co. vs. *Minnesota*, 274 U. S. 1 21

Liggett Co. vs. *Lee*, 288 U. S. 517 22

Metropolis Theatre Co. vs. *Chicago*, 228 U. S. 61.. 24

Nebbia vs. *New York*, 291 U. S. 502 ..... 4, 18
Norfolk & Western Ry. vs. *West Virginia*, 236 U. S. 605 22
Northern Pacific Ry. vs. *Department of Public Works*, 268 U. S. 39 22
Northern Pacific Ry. vs. *North Dakota*, 236 U. S. 585 22

PAGE

Quong Wing vs. *Kirkendall*, 223 U. S. 59 24

Rast vs. *Van Deman & Lewis Co.*, 240 U. S. 342 .. 24
Royster Guano Co. vs. *Virginia*, 253 U. S. 412 ... 18

Singer Sewing Machine Co. vs. *Brickell*, 233 U. S. 304 24
Smith vs. *Cahoon*, 283 U. S. 553 ..... 22, 27
Standard Oil Company vs. *United States*, 221 U. S. 1 21

Tax Commissioners vs. *Jackson*, 283 U. S. 527 .... 23, 24

United States vs. *United States Steel Corporation*, 251 U. S. 417 21

Williams vs. *Standard Oil Company*, 278 U. S. 235 21

STATUTES AND OFFICIAL REPORTS:

New York Agriculture and Markets Law Article 25-A (Chapter 822 of Laws of 1934) ..... 14, n.

Report of the New York Joint Legislative Committee to Investigate the Milk Industry—Legislative Document (1933) No. 114 ..... 4, 5, 14, 15

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Opinion Below.

The opinion of the United States District Court for the Southern District of New York is reported in 7 Fed. Supp. 352.

Statute Involved.

The statute involved is Article 21 and Article 21-A of the Agriculture and Markets Law of the State of New York, added by Chapter 126 of the Laws of New York of 1934 (not yet officially compiled).

The only part of the statute the validity of which is challenged in this action is the last sentence of Section 258 (q) of Article 21-A which provides as follows:

> "* * * * * shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-

three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city." (Record, p. 60).

The above quoted section must be read in the light of Section 258 (m) which provides in part as follows:

"The commissioner shall investigate what are reasonable costs and charges for producing, hauling, handling, processing and/or other services performed in respect to milk, and what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, and be most in the public interest. The commissioner shall take into consideration the balance between production and consumption of milk, the costs of production and distribution, and the purchasing power of the public.

"1. The commissioner, after making such investigations, may fix by official order:

"(a) The minimum prices to be paid by milk dealers to producers and others for milk in its various grades and uses * * *.

"(b) The minimum and/or maximum wholesale or retail prices to be charged for milk handled within the state for fluid consumption and wheresoever produced, when sold by milk dealers to consumers; by milk dealers to stores either for consumption on the premises or resale to consumers; by stores to consumers except for consumption on the premises where sold; by milk dealers to other milk dealers. A minimum wholesale or retail price

to be charged for milk shall not be fixed higher than is necessary to cover the costs of ordinarily efficient and economical milk dealers, including a reasonable return upon necessary investment. The fact that some dealers selling milk not having a well advertised trade name to stores in a city of more than one million inhabitants avail themselves of the privilege of making such sales at less than the minimum price shall not require fixing of the price higher than would otherwise be necessary." (Record, pp. 53-5).

Statement.

Nature of Case.

The sole issue in this case is the validity, under the "due process of law" and "equal protection of the laws" clauses of the Fourteenth Amendment to the United States Constitution, of that part of Section 258 (q) of the Agriculture and Markets Law above quoted, and the orders of the respondent Commissioner of Agriculture and Markets made pursuant thereto, which permit milk not having a well advertised trade name to be sold in New York City by dealers to stores and by stores to consumers at a price one cent less than the price at which the appellant's milk may be sold, and deny the right of the appellant to sell its milk at the lower price charged by its competitors.

The action was commenced pursuant to Section 266 of the Judicial Code (Title 28 U. S. Code § 380) by an application for an interlocutory injunction (Record, p. 64). The case was heard on such application by a statutory court of three judges. The relief prayed for was denied and the complaint dismissed upon the merits (Record, p. 119). Probable jurisdiction was found by this Court on October 8, 1934.

Statement of Facts.

In order that the provision challenged in this action (which for convenience will be referred to as the "one cent differential") may be understood it is necessary to

give something of the background of the legislation of which it is a part.

This provision is contained in the second of two fundamentally similar statutes for the control of the production and marketing of milk in New York State. The first of these statutes was adopted on April 10, 1933 as Chapter 158 of the Laws of New York of 1933 and expired by its own terms on March 31, 1934 (Record, p. 18). This was the statute which was before this Court in *Nebbia* vs. *New York*, 291 U. S. 502. (This statute will be referred to as the 1933 Milk Control Law.) The present statute became effective April 1, 1934 and is to continue until April 1, 1935 (Record, p. 39). (This statute will be referred to as the 1934 Milk Control Law.)

The 1933 Milk Control Law had its origin in the highly competitive conditions in the milk industry. The appellant had been in the business of distributing milk under the trade name "Borden's" since 1917 (Record, pp. 70-1). The trade name "Borden's" had been used by appellant and its predecessor, The Borden Company, in and about New York City for 75 years (Record, p. 71). The appellant had a great number of competitors. These competitors ranged from large organizations with city wide distribution to small units operating only in localized areas (Record, pp. 8, 71).

There were then, as there are now, two methods of distributing milk to consumers in New York City. The first was by door to door delivery; the second was over the counter at retail stores (Pitcher Report, p. 163*). There was intense competition in both branches, but the number of competitors was much larger with respect to the store business than with respect to the door to door delivery business (Pitcher Report, pp. 165-6). The heavy overhead costs of the door to door business and the correspondingly large capital investment required for its operation

*Report of the New York Joint Legislative Committee to Investigate the Milk Industry—Legislative Document (1933) No. 114. This report is referred to, *infra*, p. 5. Copies will be made available on the argument.

tended to limit the number of dealers operating in that field. Appellant has, since its organization, engaged in both types of business (Record, p. 70). *The one cent differential applies, however, only to the store business,* for which nearly 200 milk dealers compete (Pitcher Report, p. 165).

Upon this highly competitive industry the depression had a marked effect. With a greatly decreased demand for milk, the New York milk shed was flooded with a huge surplus (Pitcher Report, pp. 79-80, 97). Because of the attempts of milk producers to market this surplus the price of milk, both to them and to consumers, began to sink rapidly (Pitcher Report, p. 41). A price war was inaugurated with the result that the producers were being forced to sell below their cost of production (Pitcher Report, p. 46).

The situation in the industry in New York City was rendered more acute by the fact that in November, 1931, the Board of Health recommended that the sale of "loose milk"* be prohibited. This recommendation was, after several postponements, made effective on June 1, 1933 (Record, p. 85). The ban upon loose milk caused a considerable change in methods of distribution of the dealers. The resulting struggle for the new market in bottled milk intensified the already severe competition and contributed to the price war which demoralized the price structure (Record, p. 85).

In the face of this situation a joint legislative committee, known as the Pitcher Committee, was appointed to investigate the milk industry in New York and to make recommendations with regard to it (Record, pp. 81, 87). This Committee made an exhaustive inquiry.

The Pitcher Committee on February 13, 1933 issued its "First Preliminary Report," which was followed by its

*Loose milk was the term applied to milk sold from cans to consumers who carried away the milk in their own containers. Prior to the ban on loose milk, the over the counter store distribution of milk was limited almost entirely to loose milk. Loose milk, as the term implies, was not generally sold under any trade name. There was, however, keen competition among dealers for the business of delivering loose milk to stores. The appellant sold large quantities of this milk (Record, p. 85).

final report which was before this Court in the *Nebbia* case. Neither of these reports made any recommendation of any price differential between dealers, nor did either mention any distinction between dealers having a well advertised trade name and those not having such a name (Record, p. 81).

The preliminary report recommended the creation of a milk control board with power to investigate the milk industry and, of primary importance, with power to fix minimum prices which should be paid to producers and which should be charged for milk resold by dealers either through stores or by door to door delivery. The essence of this report was a recommendation that the State intervene to stop the price war and establish some sort of compulsory bottom to prices.

The Committee drafted a bill for a proposed milk control law embodying its recommendations (Record, p. 81). This bill provided that the Milk Control Board thereby created must fix the minimum prices which could be charged for the various grades of milk by dealers to consumers, by dealers to stores and by stores to consumers. The Milk Control Board was also permitted to impose maximum prices for such transactions and to fix the minimum prices to be paid to producers. In fixing the prices to producers the Board was permitted to "classify such milk by forms, classes, grades or uses" as it might deem advisable.

There was no provision in this bill as prepared by the Pitcher Committee for any differential between any dealers or groups of dealers (Record, p. 81). The bill contemplated that every dealer should pay to every producer the same price for a given classification of milk and that every dealer and every *store was entitled to charge* the same price for a given classification of milk. The Committee envisaged differentials based on differences in quality, use or service. It did not contemplate any differential where there was no such difference.

While the bill was in the Legislature a provision for a one cent differential with respect to the store business was

inserted in the bill by amendment. With this provision the bill became the 1933 Milk Control Law (Record, p. 18).

After the passage of this bill as so amended the Milk Control Board proceeded by official orders to fix the minimum prices which could be charged by dealers to consumers, dealers to stores and stores to consumers (Record, p. 35).

At the same time the Milk Control Board promulgated an order defining the phrase "well advertised trade name" and determined that that phrase applied to four milk distributors, namely, the appellant, Sheffield Farms Company, Dairymen's League Cooperative Association and M. H. Renken Dairy Company (Record, p. 34). These four companies did not more than thirty-five per cent. of the total store business (Record, p. 81). The effect of this order was that these four companies were required to conduct their store business at a price one cent higher than any of their competitors by reason of the fact that, although merely permissive in terms, the one cent differential has been universally taken advantage of by dealers not classified as having a well advertised trade name (Record, p. 72).

This order defining the companies as against which the one cent differential operates has never been amended (Record, p. 8). The correctness of the determination upon which this order is based is not in issue in this action, but it is not admitted by the appellant.

Prior to the expiration of the 1933 Milk Control Law the Milk Control Board recommended the continuance for another year of the major provisions of the 1933 law. It also recommended a number of changes, many of them administrative, and to carry out its suggestions prepared a new bill. Like the Pitcher Committee, it did not include the one cent differential in such bill (Record, p. 82). Again in the Legislature such a provision was inserted by amendment at the insistence of certain New York City dealers not having well advertised trade names (Record, p. 93). It is this provision which is attacked in the present case.

Appellant had no adequate remedy at law.

Under the 1934 Milk Control Law the appellant, as a milk dealer, was required to obtain a license in order to operate after May 1, 1934 (Record, p. 10). Unless such license was obtained continuance of its business was illegal (Record, p. 79). Also it was illegal for appellant's store customers to purchase milk from it (Record, p. 80). In order to obtain the license appellant was required to file with the respondent Commissioner of Agriculture and Markets an application in which, among other things, it undertook to comply with all rules, price fixing orders and other orders made by the Commissioner, including the rules and orders relating to the one cent differential (Record, p. 10). Appellant tendered to the Commissioner an application for a license and the fee therefor, and in all respects obeyed the requirements of the Commissioner except that it objected to compliance with the rules and orders relating to the one cent differential (Record, pp. 79, 83). Because of this refusal the appellant's application for a license was rejected (Record, pp. 79, 84).

The sale of appellant's bottled milk in New York City involved over 300,000 separate transactions daily (Record, p. 79). Unless appellant obtained a license, or was protected by injunction, each such transaction rendered the appellant and its officers, agents and employees liable to a penalty of $200 and to fines in equal amount for each bottle of milk sold, and also rendered the appellant's officers, agents and employees liable to imprisonment (Record, p. 79). In addition, appellant's store customers were liable to similar penalties, fines and imprisonment (Record, p. 80).

Appellant could not have attempted to challenge the validity of the statute and orders complained of by a single isolated violation. By reason of the one cent price differential the appellant estimated that its direct loss in business in sales to stores was in excess of 25,000 quarts daily (Record pp. 14, 80). The appellant was forced to operate this business at a price 10% higher than the ma-

jority of its competitors. In addition, the appellant's door to door delivery business was suffering severe losses due to a two cent or 20% differential against it in favor of store milk without a well advertised trade name. This resulted from an additional one cent price differential between milk delivered directly to consumers and milk purchased through stores (Record, pp. 73, 80). Appellant was daily being subjected to irreparable injury.

The appellant is now operating under a temporary restraining order granted by Judge Caffey and continued by the statutory court, by the terms of which the respondents are restrained from enforcing against appellant or any of its customers any of the penalties provided in the Agriculture and Markets Law by reason of the appellant operating without a license so long as the appellant complies with all the provisions of the law and all the rules and orders of the Commissioner except those requiring the appellant to agree to obey the rules and orders regarding the one cent differential (Record, p. 120).

Assignment of Errors.

The assignment of errors is as follows (Record, p. 122):

1. The United States District Court for the Southern District of New York erred in denying the interlocutory injunction prayed for by the appellant.

2. The Court erred in dismissing the bill of complaint for want of equity.

3. The Court erred in holding that the last sentence of Section 258 (q) of the Agriculture and Markets Law of the State of New York (as adopted by Chapter 126 of the Laws of 1934) and the orders adopted by the respondent Commissioner of Agriculture and Markets pursuant thereto did not deprive the appellant of its property without due

process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

4. The Court erred in holding that the said last sentence of Section 258 (q) of the Agriculture and Markets Law and the said orders adopted pursuant thereto did not deny the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Summary of Argument.

I. The provision for the one cent differential constitutes an arbitrary and unreasonable discrimination against the appellant and others similarly situated, which denies them the equal protection of the laws.

II. The provision for the one cent differential represents a new departure in governmental regulation and is of a character which has never been sanctioned by this Court. The principle involved is unsound and its approval will lead to far-reaching and dangerous consequences.

III. The one cent differential is not an integral part of the Milk Control Law and may be declared invalid without invalidating the remainder of the statute.

ARGUMENT

I.

The provision for the one cent differential constitutes an arbitrary and unreasonable discrimination against the appellant and others similarly situated, which denies them the equal protection of the laws.

That the provision is discriminatory is immediately self-evident.

First, the State prescribes the standards and classification of milk and the conditions under which it may be sold. The State then proceeds to fix and determine uniform minimum prices to be paid to producers, so that each producer will be assured the same price for the same quality of milk. The State next prescribes minimum prices at which milk may be sold to stores and by stores to consumers. The State then decrees that, although the milk sold by all distributors must conform to the same standards, the milk of certain distributors must be sold at a higher price while their competitors are permitted to sell at a lower price, and the former may not enter into free and open competition with the latter.

The sole distinction upon which this discrimination is based is the possession of a "well advertised trade name." It may be well, therefore, at the outset, to analyze the character of this distinction.

The appellant and its predecessor have been selling milk for 75 years. During part of that time, at least, it has advertised its product. It has built up a good name for quality, purity and cleanliness. But if the appellant for one week should distribute an impure milk, a diseased milk, or a milk injurious to health, its business would disappear over night. The fact of advertising does not, in reality, therefore, constitute the criterion upon which this penalty is imposed. It is the good reputation which the appellant has built up over the years. The "well advertised trade

name'' is merely the symbol and not the substance. By this provision the State elects to say to competing dealers ''You who have not built up and maintained a reputation and a well known name may sell your milk at a certain price, but you who have spent years in building up a reputation and a well known name may not sell your milk at that price and meet that competition. You must sell at a higher price.'' And this when the State, by other statutory provisions, has decreed that the milk of both competitors must meet identical standards.

The vice lies not in fixing the price at which milk may be sold, but in prohibiting the appellant from meeting the price of competitors in fair and open competition. That is the essence of this case.

Certainly the element of advertising, or the possession of a ''well advertised trade name'', constitutes a wholly artificial and inadequate distinction upon which to base a discrimination so far-reaching in its effect.

The reasonableness of the classification established by the one cent differential is to be judged in the light of the following considerations:

1. It has not been advocated by any of the impartial investigating agencies.

The one cent differential was not recommended by the Pitcher Committee after its thorough investigation nor by the Milk Control Board after one year of administration of the law. It is apparent, therefore, that the differential does not constitute a feature of any considered policy. It is not the product of careful analysis by the economic and social experts delegated by the State to study the situation and to formulate appropriate remedies. Nor has it been adopted by other States having milk control laws similar to that of New York. In none of them is there provision for any differential analogous to the one cent differential (Record, pp. 82, 89). Even in New York State the one cent differential applies only in New York City and only to one branch of the business. And even in New York

City it applies only to dealers who have been in the business continuously since April 10, 1933.

2. It has no relation to cost.

There is no evidence in the record and no finding by the Pitcher Committee, the Milk Control Board, the present Division of Milk Control or any other agency affording any basis for relating the one cent differential to the cost of appellant's advertising or to the general costs of operating its business. It is uncontradicted on the face of the record that appellant's advertising costs less than one-fifth of a cent per quart of milk sold (Record, p. 72).

3. It has no relation to quality.

There is no evidence in the record, nor has it been suggested that the one cent differential is based upon quality. Apart from the one cent differential, prices of milk are graded on the basis of quality (butter fat content and the like). The milk which appellant's competitors may sell at one cent less than appellant is milk which is required by law to adhere to the identical classification standards as the appellant's milk.

4. It has no relation to service.

The one cent differential has no relation to the amount or quality of the services rendered. The actual selling of the milk to which the differential relates is done by stores independent of either the appellant or its competitors. The standards for bottles, caps and the like are fixed by law and are uniform for all dealers.

5. It is not an expression of policy against appellant's advertising.

The one cent differential does not represent an attempt to regulate or to discourage advertising. In fact, the State

of New York is itself now spending thousands of dollars in advertising milk.* It thus has declared its policy as distinctly in favor of advertising milk generally. There is no indication in the findings of the Pitcher Committee, in the record of this case or in the language of the statute that appellant's advertising is objectionable in substance or in form, or that any attempt is being made to regulate it. The statute would not even permit the appellant to obtain the benefits of the differential if it should alter its advertising or even cease such advertising altogether.

6. It is not aimed at unfair practices.

There was no finding by the Pitcher Committee, nor is there any suggestion in the record that the dealers classified as having well advertised trade names were guilty of any unfair practices.

7. It is not directed against monopoly.

The possibility of monopoly, or "concentration of economic power," was suggested by the Court below as a justification for the one cent differential. The record and the findings of the Pitcher Committee negative the existence of any reasonable basis for such fear.

The Pitcher Committee expressly found:

(a) That the four dealers described as selling milk under a well advertised trade name do only about thirty-five per cent. of the store business (Pitcher Report, pp. 163, 165-6).

(b) That in New York City less than half of the milk sold is distributed by door to door delivery.

*Article 25-A of the Agriculture and Markets Law, added by Chapter 822 of the Laws of 1934, provides for a Bureau of Milk Publicity with power to carry on an extensive advertising campaign to increase the consumption of milk. The cost is to be defrayed by a State appropriation (Record, p. 82).

Since 1930 the sales of bottled milk through stores have increased at the expense of sales by door to door delivery (Pitcher Report, p. 163).

(c) That there are 189 milk distributors in New York City, selling to stores, where the one cent differential is involved, each of whom sells more than 1,500 quarts daily. These distributors average 18,519 quarts of milk per day (Pitcher Report, p. 165).

The Committee expressly pointed out the absence of any element of monopoly:

"Although the number of milk distributors has tended to diminish and a few companies to emerge as the dominant factors in the various markets, there are few cities in the United States and *none in New York State* where any one company has a monopoly or near-monopoly of the business." (Pitcher Report, p. 165)

"During the past two years, the trend toward a decreasing number of distributors in most cities has been reversed, particularly in those cities where strict sanitary requirements are not enforced. Even in New York City 70 milk distributors started in business between November, 1932, and January, 1933, and only 28 discontinued operation during the same period." (Pitcher Report, pp. 166-7)

"* * * competition has not as yet given way to monopoly in any of the cities of this state. Recently on account of unusual and probably temporary conditions the number of distributors has tended to increase. *Competition is keen to the point of being wasteful and destructive.*" (Pitcher Report, p. 180) (Italics ours.)

8. It results in no benefit to the farmers.

The price paid to the farmer for his milk is the same irrespective of the retail price at which the milk is sold. He gets the same price for milk sold under appellant's trade name as for that which sells one cent cheaper (Record, p. 89). He does not get the benefit of the differential although it was in his interest that the Milk Control Law was passed.

The Court below suggested that the farmer might be benefited because more milk might be sold at the two price system than if all milk were required to be sold at the higher price. Obviously, this is no more than an argument that the proper price for all is the lower price permitted to appellant's competitors. It is no justification for the differential.

9. It is economically indefensible.

The one cent differential, in effect, permits appellant's competitors to continue the "destructive trade practices" which the Law aimed to prevent. The statute by its terms requires the Commissioner to determine "what are reasonable costs and charges" and what prices "will best protect the milk industry in the State," and on the basis of this determination to fix the minimum prices. Such prices are the ones which the appellant and the other dealers selling well advertised brands are required to charge. The law further provides that the price "shall not be fixed higher than is necessary to cover the costs of ordinary efficient and economical milk dealers, including a reasonable return upon necessary investment" and further that the fact that some dealers not having a well advertised trade name are permitted to sell at one cent less "shall not require fixing of the price higher than would otherwise be necessary." It is apparent that if the price which the Commissioner has fixed for the appellant's milk is reasonable and will best protect the milk industry, the 10% lower price which the appellant's competitors are per-

mitted to charge must be unreasonable and not designed to protect the milk industry.

Furthermore, the introduction of the one cent differential must inevitably add enormously to the difficulty of enforcing the broad price fixing provisions of the statute, if it does not render such enforcement impracticable. The theory underlying this inconsistent provision is contrary to the whole purpose and intent of the statute and cannot fail to contribute to the defeat of the enforcement of its sound provisions.

10. It has no relation to the emergency giving rise to the Milk Control Law.

The inconsistency pointed out above between the one cent differential and the other provisions of the law is occasioned by the fact that the differential has no relation to the emergency which the law was designed to alleviate. The law established state-wide price regulation to protect the interests of the entire people in an industry of vital importance. The application of the law was uniform with the sole exception of the differential. The latter was inserted, not to further the rehabilitation of the industry as a whole, but solely to meet the demands of a particular local group. In consequence, the principle, once established, will hold good, irrespective of any emergency.

From the foregoing it is clear that the discrimination has no other basis than a difference in reputation or good will. Two competitors may be in all respects alike, but if one has a "well advertised trade name" he is compelled to sell at a higher price and is not permitted to meet on equal terms the competition of a rival dealer. The differential has in purpose and inevitable effect the imposition of a penalty upon the reputation of one competitor—upon the good will which constitutes one of his most valuable assets. Such a discrimination is arbitrary and unreasonable and takes from him his property without due process and denies him the equal protection of the laws.

II.

The provision for the one cent differential represents a new departure in governmental regulation and is of a character which has never been sanctioned by this Court. The principle involved is unsound and its approval will lead to far-reaching and dangerous consequences.

In *Nebbia* vs. *New York, supra,* this Court sustained the validity of the 1933 Milk Control Law in its broad aspects. It held that the Constitution did not forbid the imposition of compulsory minimum prices at which milk might be sold in New York State during the emergency period therein provided. That case was directly concerned only with those features of the law which operated alike upon all dealers of the same type. The provision for the one cent differential was not then under consideration.

In that case the Court approved a differential between the price of milk on door to door delivery and the price of milk sold from stores. As pointed out by the Court such differential is justified by a difference in the quality and cost of the services rendered—factors entirely lacking in the one cent differential. The differential in that case met the test previously laid down that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (*Royster Guano Co.* vs. *Virginia,* 253 U. S. 412, 415.)

The provision for the one cent differential wholly fails to meet these fundamental requirements. It is an anomalous and inconsistent provision grafted upon the main statute before passage as a result of insistent pressure by a particular group. It bears no real relation to the main purposes of the statute. Furthermore, it is arbitrary and discriminatory, in that it prescribes different prices for the same product, the distinction being based solely upon the possession of a well-advertised trade name.

The issue presented is fundamental and of great importance. The introduction of governmental price fixing into a highly competitive industry like the milk business is, of itself, in the nature of a hitherto untried experiment, which must necessarily disturb existing economic laws and relations. And this is true even if the utmost care be taken to see that the price regulations bear equally upon all parties similarly circumstanced. But if, before the statute even has a trial, the Legislature yields to the pressure of one particular group and attempts to adjust the ordinary and familiar differences in business relationships by discriminations in price between individual competitors, the situation will lead to chaos and in the process work irreparable injury.

Most important of all, once the principle is established, it is capable of indefinite extension. Subsequent development is only a matter of degree. The one cent differential in this case was not the result of any Legislative investigation or fact finding. If one cent, why not two, or three cents? The door is opened for all sorts of particular groups and interests to press upon the Legislature their demands for favors and preferences which will aid them in their efforts to gain some advantage over other competitors. The history of such movements is only too familiar.

If the one cent differential is sustained for milk, it must logically be sustained for bread, for meat, for clothes, for gasoline, for any one of a vast number of basic products and services. Can the Legislature safely be permitted, under the pressure of minority groups, to determine one man's bread is to enjoy a preference against another's irrespective of quality, cost, or other difference of product? If a merchant or dealer has succeeded in building up a reputation and a name for his product, is the Legislature to step in and fix a higher price for [illegible] time allow his competitor to sell a [illegible] price? May one seller with an establish[illegible]utation be denied the right to meet the price of a lesser known competitor?

Let us suppose that two dealers have been in business for a given period under similar conditions. Dealer A has periodically expended a portion of the proceeds of his business in advertising his product and has built up a well advertised trade name. Dealer B, on the other hand, has made no such expenditure, but has either retained his profits or disposed of them in salaries or dividends. Can the Legislature properly limit Dealer A to sales at a fixed minimum price and authorize Dealer B to sell at a price below that fixed for Dealer A?

The Court below in sustaining the one cent differential rested its decision largely upon the supposition that the Legislature might have been motivated by the belief that in the absence of the one cent differential "the whole market would fall into few hands." The Court recognized that the statute sought to take from certain distributors "economic advantages which were not only theretofore lawful but which have generally been commended and fostered." Nevertheless it concluded that the Legislature was justified in thus summarily depriving appellant of these advantages because it imputed to the Legislature a belief that "concentration of economic power" might result.

We know of no similar attempt to penalize the normal growth and development of an enterprise solely on the basis of an alleged possibility of a "concentration of economic power," nor do we know of any decision sustaining such a penalty. Were the State Legislature vested with such power, the State would necessarily become a permanent equalizer of competition by adjusting relative business advantages from time to time in such a way as to offset the natural preferences of consumers. The public would be compelled to pay more for the product which it wanted or to abandon it in favor of a less desired product because the Legislature might at some time entertain the belief that one or more concerns were capturing from their less successful competitors what the Legislature regarded as too large a percentage of the market.

The Court below stated that a "concentration of economic power has generally been watched with a jealous eye in this country" and that "to prevent it or to break it up, rather than to regulate it after it arises, has on the whole been our preferred way." This is merely another way of stating that handicaps may be imposed upon an enterprise simply because it is successful—a doctrine disapproved by this Court in *Standard Oil Company* vs. *United States*, 221 U. S. 1, and finally disposed of in *United States* vs. *United States Steel Corporation*, 251 U. S. 417. We have not in the past placed hurdles in the way of growing and successful concerns, so long as the conduct of their business was free from just criticism.

In passing, it is to be noted that this Court has held that the possibility of monopoly without more does not justify price regulation even if it be of uniform application. *Fairmont Creamery Co.* vs. *Minnesota*, 274 U. S. 1; *Williams* vs. *Standard Oil Company*, 278 U. S. 235. Price regulation resulting in a direct subsidy to one enterprise at the expense of another competitor is even less entitled to support.

In view of the novel situation here presented we have been able to find no authorities precisely governing the present case. But we know that this Court, while disposed to exercise sparingly its power of interference, has time and again refused to sanction attempts by State Legislatures to use their sovereign power in a discriminatory fashion.

Thus the power to regulate the great stock yards was not long established when a State Legislature attempted to fix the rates to be charged by stock yards in Kansas which handled more than a specified number of live stock each day. The specified number was so chosen as to exclude all the stock yards but one. This Court held such attempt at special privilege invalid.

Cotting vs. *Kansas City Stock Yards Company*,
183 U. S. 79.

The power of the State Legislature over railroad rates has many times given rise to attempts to prescribe rates for certain favored products, which rates were non-compensatory although the sum of all rates might give a fair return. This Court has consistently held these attempts invalid.

Banton vs. *Belt Line Railway Corporation*, 268 U. S. 413;
Northern Pacific Railway vs. *North Dakota*, 236 U. S. 585;
Norfolk & Western Railway vs. *West Virginia*, 236 U. S. 605;
Northern Pacific Railway vs. *Department of Public Works*, 268 U. S. 39.

Soon after it became established that the States might regulate motor bus transportation of persons or property by requiring the giving of bonds and insurance policies for the protection of the public, a State Legislature attempted to except from regulation companies transporting certain favored agricultural products. This attempt to discriminate in the exercise of governmental power was held invalid.

Smith vs. *Cahoon*, 283 U. S. 553.

The right to impose different taxes upon chain stores from those imposed upon single unit stores was scarcely upheld when this Court had to hold invalid an attempt to push the new power to the limit by drawing the line at county boundaries.

Liggett Company vs. *Lee*, 288 U. S. 517.

These and numerous other cases illustrate attempts by State Legislatures to use new forms of governmental regulation for the benefit of a privileged group. The present case is different from *Cotting* vs. *Kansas City Stock Yards Company, supra*, only in that in this case four companies are discriminated against instead of only one. Philosophi-

cally, the issue is the same in all of these cases. This issue is whether or not the power of government may be used to aid or injure particular individuals or groups when there is no substantial difference between them, or the difference is inadequate to support the distinction.

In the cases where this Court has sustained treatment by State Legislatures of one group differently from another it has always done so upon the basis that there was a substantial difference between the groups and that this substantial difference had a proper relation to the difference in treatment.

In *Tax Commissioners* vs. *Jackson*, 283 U. S. 527, this Court sustained a State tax upon stores which was graduated according to the number of stores under a single ownership and management. The tax clearly imposed a different burden upon chain stores from individual stores. In sustaining that tax this Court found that "the record shows that the chain store has many features and advantages which definitely distinguish it from the individual store dealing in the same commodities." This Court enumerated a series of differences between the chain stores and individual stores, differences in management, methods of distribution, policies, accounting methods.

The record in the present case shows no substantial difference between the appellant and its favored competitors. No such differences exist. As we have pointed out, this discrimination would be effective as between milk dealers which were in every respect identical with the sole exception that one had and one had not that uncertain thing called a "well advertised trade name."

There was a real difference between persons and corporations carrying on the business of refining sugar and molasses on the one hand and planters and farmers grinding and refining their own sugar and molasses on the other hand (*American Sugar Refining Co.* vs. *Louisiana*, 179 U. S. 89); between warehouses situated on the right of way of a railroad and those not so situated (*Cargill* vs. *Minne-*

sota, 180 U. S. 452); between a great meat packing house on the one hand and wholesalers and commission merchants on the other (*Armour Packing Co.* vs. *Lacy,* 200 U. S. 226); between hand laundries on the one hand and steam laundries on the other (*Quong Wing* vs. *Kirkendall,* 223 U. S. 59); between private bankers lending money at high rates upon salaries and household furniture on the one hand and commercial bankers lending money upon commercial securities on the other (*Bradley* vs. *Richmond,* 227 U. S. 477); between luxury theatres charging a high admission and low priced theatres (*Metropolis Theatre Co.* vs. *Chicago,* 228 U. S. 61); between the local tradesman and the itinerant dealer (*Singer Sewing Machine Co.* vs. *Brickell,* 233 U. S. 304).

A tax which imposed a different burden upon retail dealers offering coupons, profit sharing certificates and the like from those who did not offer such coupons or profit sharing certificates was sustained in *Rast* vs. *Van Deman & Lewis Co.,* 240 U. S. 342. Here again the reality of the difference between the methods was obvious to anyone familiar with the merchandising methods of that period. Again a tax was involved. In this case it is not a tax. Above all in this case, as we have pointed out, there is no suggestion that methods of advertising are to be regulated, that this appellant could avoid the discrimination against it by any change in method or quality or quantity of its advertising.

All of the foregoing cases and numerous others reveal that where differences in treatment have been sustained they have been sustained because there was a difference in fact. The difference was one of substance. In this case there is no suggestion of any such difference anywhere in the record.

Furthermore, it is particularly to be noted that practically all of these cases were tax cases. In supporting the chain store tax in *Tax Commissioners* vs. *Jackson, supra,* this Court gave emphasis to the fact that a tax was involved and that "the power of taxation is fundamental

to the very existence of the government of the states." A tax is very different from the regulation of prices. The collection of revenue is essential to the continuance of the state governments; the distribution of business between competing milk dealers in a single locality is in no sense essential for that purpose. In sustaining various types of taxes this Court has taken cognizance of the great difficulties experienced by governments in finding new subjects of taxation and in obtaining from them an adequate revenue while at the same time distributing with reasonable justice the burden among the citizens and businesses located within their borders. Discretion must be allowed to a state government for this purpose. The difficulty of the task requires it.

In the cases above cited the State has, in the discharge of its own necessities, fastened upon a substantial difference in classification as a justification for taking, in taxes, a different share of the ultimate proceeds of the business. Meantime competitive conditions between individual competitors, including prices to be charged, were not interfered with. But we know of no case in which the State has stepped into the market place and arbitrarily fixed different prices at which competitors similarly circumstanced might sell the same product.

The basic distinction between the legitimate fields for the exercise of the taxing power and of the police power of the States was pointed out by this Court in *Connolly* vs. *Union Sewer Pipe Company*, 184 U. S. 540, where it said:

> "The decision now rendered is not at all in conflict with the views expressed in the two cases just cited. It is sufficient to say that those cases had reference to the taxing power of the State, and involved considerations that could not, in the nature of things, apply to a State enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. * * * But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the

> pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity'' (Page 562).

The Legislature can and should take proper measures to see that competitive conditions in general are free from improper restrictions and fair and equal. But if it is to be free to intervene in each competitive group in each community and to discriminate between different competitors by arbitrarily establishing different prices for the same article, the result will be chaotic, and the door will be opened to political intrigue, to the pressure for advantage of one group against another, and to oppression. A fundamental principle is involved which far transcends in importance the particular injury now suffered by this appellant.

III.

The one cent differential is not an integral part of the Milk Control Law and may be declared invalid without invalidating the remainder of the statute.

As we have pointed out, the one cent differential is not an essential nor even a proper part of the price fixing structure established by the Milk Control Law. The bills recommended by the Pitcher Committee and by the Milk Control Board made no mention of it and in similar legislation in other States it finds no place. It can be excised without invalidating the remainder of the statute.

Furthermore, in the very section in which provision is made for the differential the Legislature expressly provided that if any part of the statute should for any reason be adjudged to be invalid, such judgment should not affect,

impair or invalidate the remainder of the statute but should be confined in its operation to the part involved in the controversy in which such judgment should be rendered. There is nothing in the statute to rebut the resulting presumption that the Legislature would have enacted the statute without regard to the one cent differential.

Champlin Refining Company vs. *Commission,* 286 U. S. 210;
Smith vs. *Cahoon, supra.*

It is respectfully submitted that the decree of the United States District Court for the Southern District of New York should be reversed and a final decree entered for the appellant in accordance with the prayer of the bill of complaint.

WALTER E. HOPE,
Counsel for Appellant.

TIMOTHY N. PFEIFFER,
JOHN E. LOCKWOOD,
EDGAR P. BAKER,
of Counsel.